

REAL TIME INTEGRATED COST PLANNING AND CONTROL: MITIGATION AND RESOLUTION OF CLAIMS

Quantity Surveying Workshop Paper

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Short Abstract

The pro-active and effective management, communication and interpretations of contracts, in respect of differences of opinion and claims, will become more important for developers and facilitators of buildings and property

The quantity surveyor should understand the challenges and opportunities presented by the needs of clients in relation to facilitating differences between parties and the limitation of claims and their pressure on resources and time

The focus should be on client satisfaction and a positive experience for all concerned to enable continuous good relationships between the parties involved. This should be done in close partnership with all functionaries, related to the process

Co-ordinating differences between parties and continuous **communication** will ensure the limitation of **claims** and will contribute towards an atmosphere of teamwork with the focus on solutions without disputes

Key words: Disputes, claims, communication, dispute resolution, conciliation, adjudication, mediation, arbitration

INTRODUCTION

This paper deals with the importance of, and the different ways in dealing with differences between parties and with claims and claims disputes.

1 MANAGEMENT OF CLAIMS AND DISPUTES

1.1 Introduction

The first step in the process of differences between parties, relating to any project, should be to establish a process whereby parties would be enabled to mitigate disputes. However, the goals of claims and dispute resolution should firstly be to establish the right of a party to submit a claim and to enable the other party to consider the claim in terms of validity, contractual terms and possible outcome

The establishment and consideration of a claim does not mean that a dispute exists, but should the rejection of a claim occur, or a different interpretation to a claim remain and parties are not able to settle or mitigate their differences, a dispute may then be the result. Dispute resolutions may then assist the parties to resolve such a dispute in a cost effective, satisfactory and timeous manner

2 The methods used to resolve disputes

For the purpose of this paper, the methods to be discussed are conciliation, adjudication, mediation and arbitration:

2.1 Conciliation

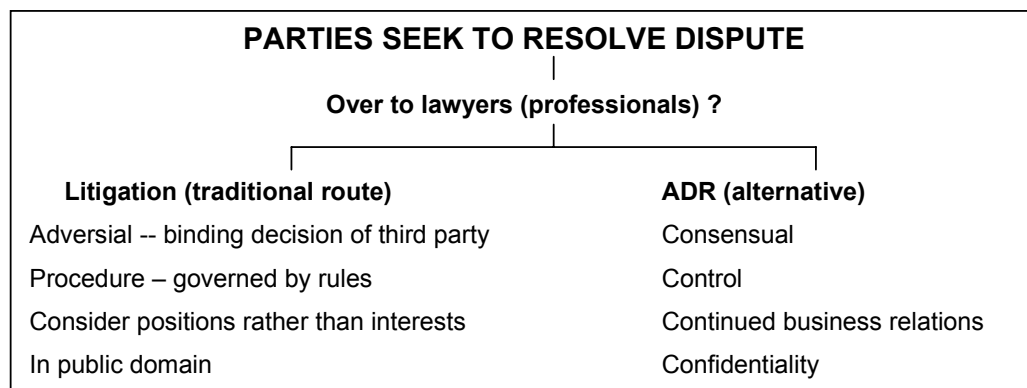
In an effort to resolve a dispute, satisfactory results are never guaranteed, not even in a court of law. It is therefore perhaps important to use inexpensive ways and methods to try and resolve a dispute

Results have shown that conciliation does have a remarkable measure of success in regard to solving differences before they can become disputes

The parties decide who the conciliator will be. The conciliator should, however, be a person with good communication skills and knowledge. The objective is to bring the parties together in a forum to investigate their contentions and assist the parties to formulate their own settlement, by indicating the consequences. Improved communication should be ensured through joint and separate meetings. The conciliator may also be requested to formulate an own opinion. In the end, parties are still left with the option to continue with litigation or arbitration. Conciliation, however, has the following foci and advantages:

- Control - the parties control the process
- Consensus – the parties aim at the best commercial solution
- Continuity - the relationship will continue
- Confidentiality - no harmful public exposure (Loots, 1991:8-13)

Diagrammatically, the following illustrates the difference between litigation and all ADR (Alternative Dispute Resolution) processes:



(Adjusted from Loots, 1991:10)

The quantity surveyor, with good communication skills is ideally positioned to play an important role in respect of conciliation because disputes usually revolve around payments, valuations, certificates and penalties

2.2 Adjudication

Adjudication is an accelerated form of dispute resolution in which a neutral, impartial and independent third party deals with the dispute as an expert and not as an arbitrator,

and whose determination is binding unless and until invalidated or overturned by an arbitration award. The adjudicator shall not give advice to the parties or their representatives concerning any aspect of the Agreement in respect of which he has been appointed other than in accordance with stated Rules [Joint Building Contracts Committee (JBCC) 2005 4.1 Adjudication rules, cl. 1.1, 3.2]

The procedure may be as follows:

- Either party shall submit full details of a dispute arising in terms of the agreement, together with copies of all relevant documents
- The other party may submit a written response
- The adjudicator shall:
 - act as an expert and not as an arbitrator
 - adopt the most cost- and time-effective procedure
- The adjudicator may also:
 - convene and conduct a hearing
 - determine the payments and costs of the dispute on the basis of the submitted documents only
 - meet with the parties
 - decide on his own jurisdiction
 - make use of specialist knowledge
 - open up documents related to the dispute
 - refuse admission to any persons other than the parties

The adjudicator's written determination of the dispute shall:

- be delivered to the parties
- outline reasons for his decisions (JBCC, 4.1, 2005, Adjudication Rules, cl. 6.0-7.0)

It is important to note that an adjudication award is not binding on the parties, but is most definitely a process that will limit the costly processes of arbitration and litigation. Quantity surveyors and cost engineers are ideally positioned to play a very active role in adjudication

2.3 Mediation

Mediation means different things to different people, but in the construction industry, it usually denotes a procedure in which a neutral third party seeks to resolve a dispute between contracting parties, by conducting an enquiry, similar to arbitration, but less formal and by giving a non-binding opinion. The parties represent themselves without calling in legal professionals. The mediator should know the details of the dispute and should give each party the opportunity to state their case. The mediator should decide which procedure is the best, based on circumstances (McKenzie & McKenzie, 1994: 174)

Quantity surveyors often perform mediation tasks for clients or other parties, be it informal as a quantity surveyor - mediator or formal by appointment. However, in terms of many contracts (re JBCC 2000 Ed. 4.1), the parties shall agree on the appointment of a mediator and meet with the mediator in an effort to reach a settlement. If a settlement is reached, the mediator shall record such an agreement which shall become binding on the parties on the signing thereof (JBCC, 2005: 27-28)

2.4 Arbitration

In some countries, arbitration is a process, provided for by an act of law, adopted by parties through mutual agreement, stipulating that they will submit any dispute that may arise between them to the impartial judgement of some third party of their choice and that the award by this impartial person will be final and binding. Arbitration is not a new process, in fact it was known to the Romans, used by the Dutch and English in the days of colonial expansion and is currently widely used in the construction industry and further afield (Finsen, 1999: 203-204)

Arbitration is a more formal process than the dispute resolution processes mentioned earlier, but arbitration has many advantages, some of these are:

- Expert knowledge of a selected arbitrator
- Possible savings in legal representation costs
- Flexibility of the process
- The decision is final and binding
- Time and money is saved
- Arbitration is a private matter (Finsen, 1999: 203; McKenzie & McKenzie, 1994: 161)

Quantity Surveyors perform or can perform an important role in arbitration, as cost advisor, expert, representative, witness or even arbitrator

3 Result

A knowledgeable professional, utilizing the claim- and dispute-resolution methods available to best effect, may assist the parties by means of these methods, to save money, time and effort

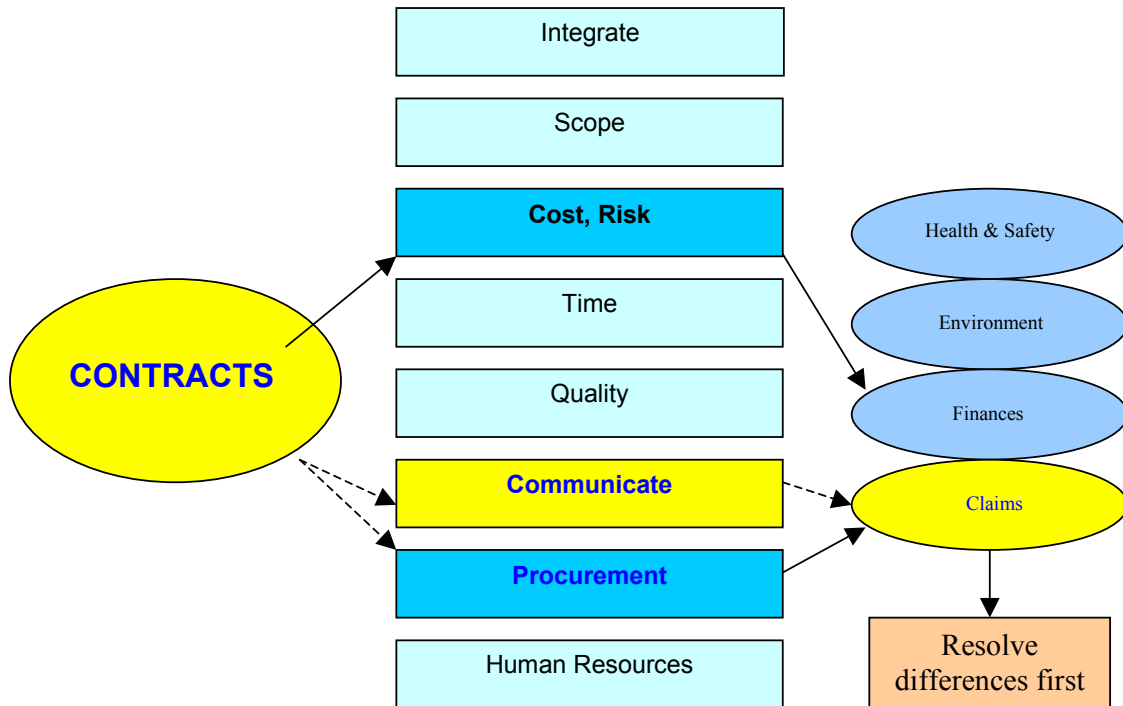
Quantity surveyors may be in a good position to assist the parties and professionals in this manner, because of their knowledge and skills in relation to determining costs, tariffs, rates, prices, certification, contract terms and contract related communication.

4 Recommendations

It is recommended that quantity surveyors and cost engineers should position themselves to perform a more dynamic role in respect of claims (or disputes). The quantity surveyor must know, understand and be able to advise, use and apply claims-adjudication and dispute resolution methods. This is an area of growth because an effective dispute resolution process will enable the parties and all role players to spend more time, money and energy on the project. The dispute resolution process to be implemented should allow for various alternatives, but be based on a real understanding of how effective management of cost, contracts, communication and claims may limit disputes and maximise project-directed energy

Diagram 1 shows the relation of the four elements as determinants of the model to project management knowledge areas

Diagram 1: Project management, knowledge and skills areas



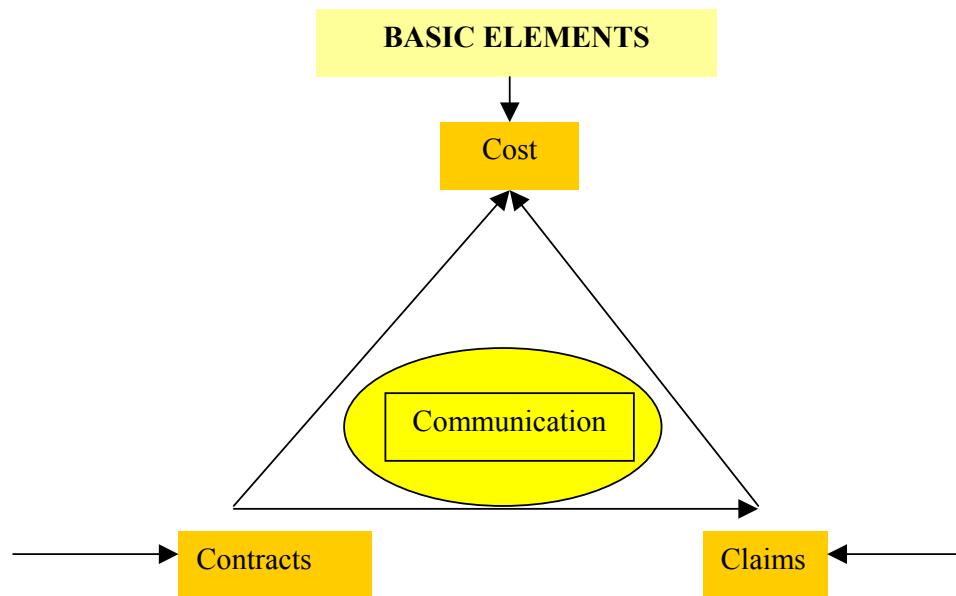
Source: (Verster, 2005a: own diagram)

The above diagram shows the importance of cost, contracts, communication and claims within the body of knowledge of project management, but links contracts to good communication, to claims and to solutions

The basic elements of the proposed Claims Model are cost, contracts, claims and communication as shown in Diagram 2. These elements also indicate how important the resolution of claims can be and the inherent potential of claims to disrupt the process and distort relationships between parties, professionals and contractors

Results will be determined by the management of the interrelationship between a claim, the possible cost risk, the contract terms and how these influences are communicated to and by the parties

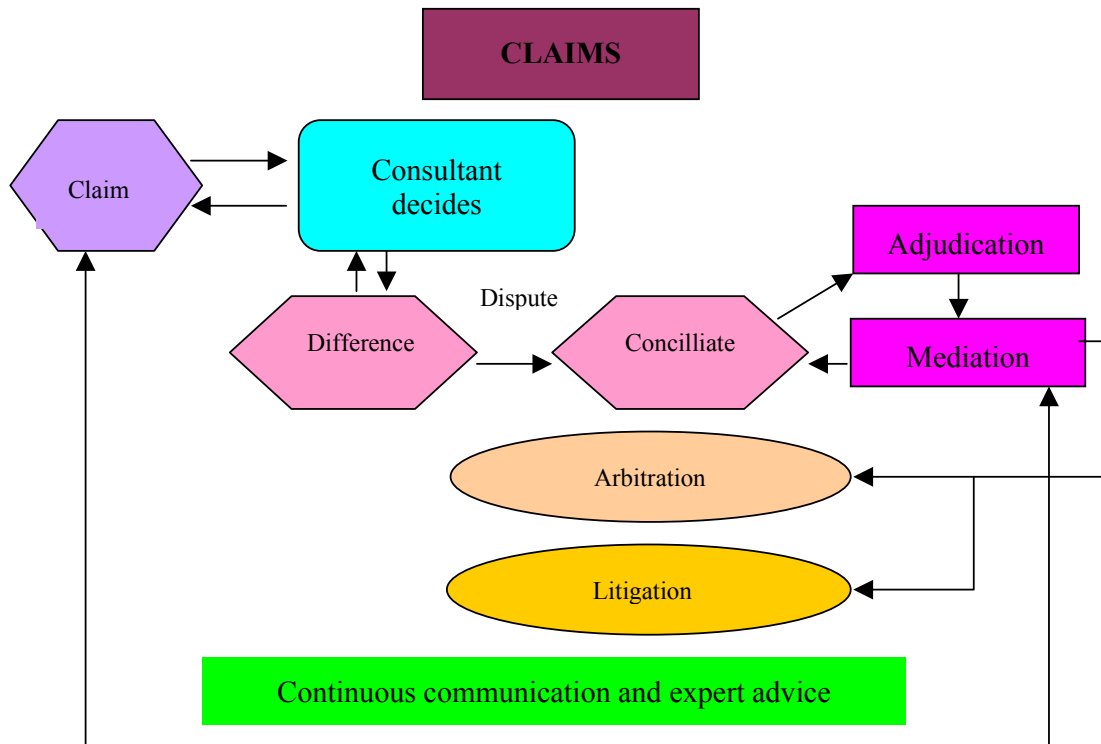
Diagram 2. Basic elements of the claims model



Source: (Verster, 2005b: own diagram)

Diagram 3 shows the various dispute resolution methods, the function within the process and the position for each.

Diagram 3. Claims



Source: (Verster, 2005c: own diagram)

The sequence of the above model is important and should be followed closely, with continuous communication being the most important aspect of the model. An atmosphere of trust and partnership must firstly be created to enable parties to function well in respect of claims

5. CONCLUSION

The aims of this paper were to show the professional how, by communicating effectively and continuously, disputes can be minimised. It also proposes some procedures to enable all functionaries and parties to the contract, to focus on achieving the project objectives. It is advised that the building blocks for resolving differences should be communication, conciliation, adjudication and mediation, with arbitration or litigation as a last resort

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